**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **JANET CLOUGH** | ) | |
| Claimant | ) | |
| | ) | |
| VS. | ) | |
| | ) | |
| **T & S TRUCKING CO., INC.** | ) | |
| Respondent | ) | Docket No. 1,024,795 |
| | ) | |
| AND | ) | |
| | ) | |
| **GREAT WEST CASUALTY CO.** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent and its carrier requested review of the July 26, 2007 Award by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on November 6, 2007.

### APPEARANCES

Robert W. Harris, of Kansas City, Kansas, appeared for the claimant. Bill W. Richerson, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

### RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. Respondent conceded that should the Board find claimant's claim compensable, that there was no dispute as to the medical bills and mileage.

### ISSUES

The Administrative Law Judge (ALJ) found that the claimant met with personal injury arising out of and in the course of her employment on July 18, 2004, and that the

preponderance of the evidence proved the claimant's work-related injury extended beyond her shoulder and into her neck. The ALJ therefore awarded the claimant a 23 percent functional impairment, 43.71 weeks of temporary total disability (TTD) and a 49.5 percent general (work) disability based upon 63 percent wage loss and a 36 percent task loss. The ALJ also concluded that claimant's medical bills were all unauthorized and as a result, respondent's liability was limited to $500.

The respondent requests review of a variety of issues. First and foremost, respondent maintains that there was an incident on July 18, 2004 that required claimant to apply her brakes, grip the steering wheel and come to a controlled stop. However, respondent maintains claimant was not permanently injured as a result of this event. Any physical complaints she had were resolved following a short course of conservative physical therapy. Thus, her complaints of neck and shoulder pain, commencing nearly 9 months after the event are causally unrelated to the July 18, 2004 event. Based upon this argument, respondent argues that it should not be responsible for the TTD or even the unauthorized medical allowance and medical mileage as awarded by the ALJ. According to respondent, the Award should be reversed in all respects.

Alternatively, respondent contends that claimant is capable of performing her job with respondent as a long haul truck driver and as such, she is not entitled to a work disability award (a permanent partial general impairment greater than her functional impairment)

Claimant argues that the Award should be affirmed in all respects.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds that the ALJ's Award sets out the facts and circumstances surrounding this claim and his recitation is detailed, accurate, and supported by the record. Therefore, the Appeals Board adopts the ALJ's recitation as its own as if specifically set forth herein.

In his Award the ALJ concluded that:

> All of the evidence tended to prove that the claimant suffered some type of injury from [the] July 18, 2004 incident, although there was [some] disagreement [about] whether the effects of the injury were temporary or permanent and whether the injury affected the neck and right shoulder, or just the shoulder. The claimant

proved by a preponderance of the evidence that she was injured in the course and scope of employment.[1]

In order for a claimant to collect workers compensation benefits she must suffer an accidental injury that arose out of and in the course of her employment. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when it is apparent to the rational mind, upon consideration of all circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.[2]

The Board has considered the parties' arguments and the evidence contained within the record and concludes, like the ALJ, that it is more likely true than not that claimant sustained an accidental injury on July 18, 2004. While it is clear that claimant's tractor/trailer did not violently impact any other vehicle, it is uncontroverted that claimant had to react quickly to bring her tractor/trailer to a controlled stop in a short period of time, all the while avoiding a collision. In doing so, she forcefully gripped the steering wheel, turned to the left and applied the brakes and another vehicle may or may not have struck claimant's tractor trailer. While this maneuver sounds innocuous in the abstract, claimant's recitation of the event certainly lends credence to her contention that as a result of this event, she sustained injury. Moreover, the claimant had no previous history of shoulder or neck problems and within 10 days of this event, she began to experience neck and shoulder complaints. For these reasons, the Board concurs with the ALJ's conclusion that claimant proved by a preponderance of the evidence that she sustained an accidental injury that arose out of and in the course of her employment on July 18, 2004.

Having concluded that claimant sustained an accident, the Board must consider the nature and extent of claimant's impairment. Respondent adamantly maintains claimant's complaints were nothing more than a temporary aggravation, as evidenced by the testimony of Dr. Roger Hood, a board certified orthopaedic surgeon. Dr. Hood testified that claimant's actions in the truck could have aggravated her preexisting degenerative disc disease in her neck, but that an aggravation would last, at best, a few days leaving her with no permanent impairment. And after the treatment she received, she was most certainly back to her base line condition. He further testified that claimant's right hand and shoulder complaints are probably cervical in nature, but they are in no way related to the July 2004 event for the simple reason that they commenced so long after the event itself. More to the point, the shoulder surgery that claimant ultimately had was for an impingement and

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[1] ALJ Award (July 26, 2007) at 4.

[2] *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

an impingement would not result from the sort of event claimant describes.[3] Put simply, pulling upwards on a steering wheel would not give rise to impingement syndrome in the shoulder. He further justified his position by pointing to the fact that claimant worked driving her regular route from August 2004 to March 2005 before asserting any complaints about her neck. And the shoulder complaints did not really surface until after her neck surgery in July 2005.

In contrast to Dr. Hood's testimony is that offered by Dr. James Stuckmeyer, also an orthopaedic surgeon, who testified that claimant sustained permanent injury to her cervical spine and shoulder, both as a direct result of the incident on July 18, 2004. Dr. Stuckmeyer conceded claimant had an asymptomatic degenerative condition in her neck but he opined that the accident claimant described exacerbated, aggravated and caused the onset of complaints in both areas. He ultimately assigned a 25 percent permanent partial impairment to the cervical spine plus an additional 5 percent for post operative dysplasia along with a 15 percent to the shoulder, which when combined, yields a 38.7 percent permanent partial impairment to the whole body.

When the parties could not agree upon the functional impairment, the ALJ appointed Dr. Terrence Pratt to conduct an independent medical examination (IME) pursuant to K.S.A. 44-510e(a). Dr. Pratt was directed to perform an IME "relative to the claimant's functional impairment *as the result of an accidental injury that occurred June 25, 2004* [sic] *. . . and give any restrictions that are related to the claimant's work related accident.*"[4] Following his examination, he wrote that "this is a 64 year-old right handed female who reports cervical as well as right shoulder involvement in relationship to a vocationally related event which occurred in July 2004."[5] He diagnosed "impingement with labral involvement post right shoulder debridement, chrondroplasty, subacromial decompression and distal clavicle excision" and "cervical spondylosis and C4-5 herniated disc, status post anterior cervical fusion at C4-5 and discectomy."[6]

Dr. Pratt assigned a 15 percent permanent partial impairment to the whole body for the cervical impairment based upon her DRE III findings. He also assigned a 15 percent to the right shoulder which when converted, yields a 9 percent whole body impairment. And when the two impairments are combined, the result is 23 percent to the whole body.

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[3] Hood Depo. at 23.

[4] ALJ Order (Oct. 4, 2006). The parties have agreed that actual date of claimant's accident was July 18, 2004.

[5] Pratt's IME Report at 4 (dated Nov. 27, 2006).

[6] *Id.* at 4-5.

The ALJ concluded that claimant sustained a 23 percent functional impairment, adopting the findings offered by Dr. Pratt. The Board has considered this finding and concludes that it should be affirmed. The Board is not persuaded by the respondent's argument that the ALJ erred when he relied on Dr. Pratt's opinions because Dr. Pratt failed to comment on the causative aspect between claimant's permanent impairment and the accident she described. It could be that Dr. Pratt presupposed a causative link between claimant's permanent impairment and the July 2004 accident. It is unclear from either his report whether he assumed claimant's injuries were work related or was giving a causation opinion. Neither the Order directing him to conduct the IME nor the referral letter contained clear instructions in this regard.[7] In any event, while one physician finds claimant's condition wholly unrelated (Dr. Hood) another physician (Dr. Stuckmeyer) has opined that claimant's condition in her neck and shoulder is causally linked to her July 2004 accident and the Board concurs in that finding. The Board likewise finds that the 23 percent functional impairment assessed by Dr. Pratt and adopted by the ALJ is affirmed.

Because claimant's injury is found to be "unscheduled", in that she has sustained impairment to her cervical spine and not just her shoulder, claimant may be entitled to a work disability under K.S.A. 44-510e(a).

When an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee**

[7] At oral arguments the parties agreed that the letter, signed by both counsel and directed to Dr. Pratt, was to be considered part of the record.

> **is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[8] and *Copeland*.[9] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a) (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.[10]

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[11]

Here the ALJ concluded that claimant had not demonstrated a good faith effort to return to work. He noted that claimant showed "only modest effort to find employment".[12] This finding is affirmed. Claimant's efforts were minimal at best and lacked any degree of specificity. At one point she was offered a job which she turned down, believing it to be beyond her physical capabilities. She now sells Avon working 8-10 hours per week. She has some computer skills and has experience in an office setting. She maintains that she cannot go back to work as a truck driver and while Dr. Stuckmeyer concurs with that assertion, Dr. Hood does not. And Dr. Pratt has expressed some concerns but that stems from claimant's complaint that she got dizzy during his examination. Although respondent maintains "there is a strong probability that the claimant has the capability to return to her former job as an over-the-road truck driver *for the employer*"[13] there is no evidence within

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[8] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[9] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[10] But see *Graham v. Dokter Trucking Group*, ___ Kan. ___, 161 P.3d 695 (2007), in which the Kansas Supreme Court held, in construing K.S.A. 44-510e, the language regarding the wage loss prong of the permanent disability formula was plain and unambiguous and, therefore, should be applied according to its express language and that the Court will neither speculate on legislative intent nor add something not there.

[11] *Id.* at 320.

[12] ALJ Award (July 26, 2007) at 5.

[13] Respondent's Brief at 11 (filed Sept. 17, 2007).

the record that any such job was offered to her. In fact, it is her testimony that she was terminated when she did not return to her job following neck surgery in July 2005. Respondent contends "[t]he claimant could re-apply and could return to work as a truck driver for Convoy if she passed a DOT physical."[14] Again, while there is no evidence that claimant did contact respondent following her neck surgery, there is likewise no evidence that respondent had any job available to her within the restrictions offered by the physicians or that she could pass any DOT physical.

The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.[15] The Act neither imposes an affirmative duty upon the employer to offer accommodated work nor does it impose an affirmative duty upon the employee to request accommodated work. Whether claimant requested accommodated work from an employer is just one factor in determining whether the claimant made a good faith attempt to obtain appropriate work.[16]

Like the ALJ, the Board believes that claimant failed to put forth a good faith effort to find post-injury employment and that a wage must be imputed to her for purposes of determining her wage loss. The only evidence within the record is that claimant had the capacity to earn $7.50 to $8.00 an hour. The ALJ used an average of those figures and imputed a $7.75 per hour, 40 hour work week to claimant, yielding a post injury average weekly wage of $310 and a corresponding wage loss of 63 percent. The Board finds this approach to be reasonable and affirms the wage loss component.

The ALJ utilized Dr. Stuckmeyer's 36 percent task loss opinion, noting that Dr. Pratt also imposed some work restrictions, thus weighing against Dr. Hood's opinion that claimant had no task loss. This finding is also affirmed, as is the overall 49.5 percent work disability.

As for the TTD, claimant testified that she was unable to work after her neck surgery, until May 7, 2006. The Board therefore affirms that portion of the ALJ's Award that grants TTD for a period of 43.71 weeks.

Although the ALJ concluded that claimant sustained a compensable injury, he nevertheless concluded "respondent and insurance carrier had good reason to refuse to provide additional treatment" so there was no unreasonable refusal or neglect.[17] This

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[14] *Id.*

[15] *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, 9 P.3d 591 (2000).

[16] *Oliver v. Boeing Company*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[17] ALJ Award (July 26, 2007) at 7.

finding is apparently based upon the fact that as of March 2005, respondent referred claimant to Dr. Wakwaya. Dr. Wakwaya advised claimant that her complaints were the result of degenerative disc disease and not due to her work-related injury. And so the ALJ believed that because the only opinion expressed at that point suggested that claimant's condition was personal, rather than work-related, that it had no obligation to provide treatment.

The Board disagrees with the ALJ's analysis. The test is not what the respondent/insurance carrier believed at the time but what the fact finder ultimately concludes. Under these facts and circumstances, the Board finds that the mere fact that respondent's own physician denied the link between claimant's complaints and her work-related injury does not render claimant's subsequent medical treatment as unauthorized. While seeking a preliminary hearing on that issue might well have been a better practice and thereby avoided the risk of incurring medical bills that were ultimately found unauthorized, the respondent and its carrier owed a duty to provide medical treatment. Accordingly, the Board finds that the medical bills incurred by claimant are determined to be authorized and are to be respondent and its carrier's responsibility, subject to the statutory fee schedule. And in addition, claimant is entitled to the unauthorized medical allowance under K.S.A. 44-510h(b)(2).

## AWARD

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated July 26, 2007, is modified in part and affirmed in part as follows:

The claimant is entitled to 43.41 weeks of temporary total disability compensation at the rate of $449.00 per week or $19,491.09 followed by permanent partial disability compensation at the rate of $449.00 per week not to exceed $100,000.00 for a 49.50 percent work disability.

As of November 20, 2007 there would be due and owing to the claimant 43.41 weeks of temporary total disability compensation at the rate of $449.00 per week in the sum of $19,491.09 plus 130.88 weeks of permanent partial disability compensation at the rate of $449.00 per week in the sum of $58,765.12 for a total due and owing of $78,256.21, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $21,743.79 shall be paid at the rate of $449.00 per week until fully paid or until further order from the Director.[18]

[18] The award calculation has also been updated to correct what appeared to be a clerical error in the number of payable weeks of permanent partial disability benefits.

Respondent is also ordered to pay all of the claimant's medical expenses at authorized. And the claimant is entitled to $500 in unauthorized medical allowance with the proper documentation.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

**IT IS SO ORDERED.**

Dated this _____ day of November, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Robert W. Harris, Attorney for Claimant
Bill W. Richerson, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge